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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 261.

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*,

v.

EDWARD GRANVILLE-SMITH, *Respondent*.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE.

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INDEX.

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Summary of Argument	4
Argument	9
I. Introduction	9
A. The Legislative Background	9
(1) The Danish Background	9
(2) The Virgin Islands Legislation	12
(3) The Limitations in the Organic Act	16
B. Division of the Argument	17
II. The Law, if Construed to Apply to Persons having No Substantial Connection with the Virgin Islands, is Ultra Vires and Invalid	18
A. The Law is Not One "of Local Application"	19
B. The Law Exceeds the "Due Process" Limitations Imposed by Congress	23
C. The Organic Act should be Construed to Limit the Power of the Virgin Islands Legislature so as to Avoid Grave Constitutional Questions	25
D. Authorities on Analogous Questions Support the Construction Here Advanced	25
III. If the Law Enacted by the Legislative Assembly of the Virgin Islands is within the Purported Authorization of Congress, then it is Invalid under either the Tenth Amendment to the Constitution or the Full Faith and Credit Clause	29
A. The Law, If Federally Authorized, Invades the Reserved Powers of the States	29

B. The Law, if Authorized, is Invalid since it Fails to Recognize the Obligations of the Full Faith and Credit Clause 34
Conclusion 45
Appendix 46
Constitutional and Statutory Provisions Involved 46

Authorities.

Cases:

Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532 40
Allgeyer v. Louisiana, 165 U.S. 578 39
Alton v. Alton, 121 F. Supp. 878, 207 F. 2d 667, dismissed as moot, 347 U.S. 610 2, 3, 17, 18, 23, 42
Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117 27
Attorney-General for Canada v. Attorney-General for Quebec, [1947] A.C. 33 27
Attorney-General for Saskatchewan v. Attorney-General for Canada, [1949] A.C. 110 27
Barber v. Barber, 21 How. 582 30
Barrows v. Jackson, 346 U.S. 249 23
Bloomer v. Todd, 3 Wash. Terr. 599 (1888) 24, 26
Bradford Electric Light Co. v. Clapper, 286 U.S. 145 40
Brassard v. Smith, [1925] A.C. 371 28
Broderick v. Rosner, 294 U.S. 629 40, 41
Buchanan v. Rucker, 9 East 191 (1808) 22
Burch v. Burch, 195 F. 2d 799 11, 15, 21
Burrus, In re, 136 U.S. 586 30
Clayton v. Utah Territory, 132 U.S. 632 26
Commissioners of Stamps (Queensland) v. Wienholt, 20 Commonwealth L. R. 531 (1915) 28

Converse v. Hamilton, 224 U.S. 243 40
Crownover v. Crownover, 274 P. 2d 127 (N.M. 1954) 37
David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N.Y.S. 2d 649 (Sup. Ct. 1954) 37*n.*
De la Rama v. De la Rama, 201 U.S. 303 30
Ferris v. Higley, 20 Wall. 375 26
First Nat. Bank v. United Air Lines, Inc., 342 U.S. 396 40*n.*
Gould v. Gould, 235 N.Y. 14, 138 N.E. 490 (1923) 37*n.*
Hancock National Bank v. Farnum, 176 U.S. 640 40
Hartford Accident and Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 39, 40
Hauptman v. United States, 43 F. 2d 86 (C.C.A. 9th, 1930) 20*n.*
Helvering v. Griffiths, 318 U.S. 371 25
Home Insurance Co. v. Dick, 281 U.S. 397 39
Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 32
Hughes v. Fetter, 341 U.S. 609 40*n.*
Insurance Act of Canada, In re, [1932] A.C. 41 27
Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948) 36
London and South American Investment Trust, Ltd. v. British Tobacco Co. (Aus.), Ltd., [1927] Ch. 107 28
McCulloch v. Maryland, 4 Wheat. 316 30
MacLeod v. Attorney General for New South Wales, [1891] A.C. 455 27
Marin v. Augedahl, 247 U.S. 142 40
Miller Bros. Co. v. Maryland, 347 U.S. 340 24*n.*, 40*n.*
Milliken v. Meyer, 311 U.S. 457 24*n.*
Mobile, J. and K.C. R. Co. v. Turnipseed, 219 U.S. 35 18

Modern Woodmen of America v. Mixer, 267 U.S. 544 40, 41
National Bank v. County of Yankton, 101 U.S. 129 26
Ohio ex rel. Popovici v. Agler, 280 U.S. 379 30
Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U.S. 493 40
Pennoyer v. Neff, 95 U.S. 714 24*n.*
Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201 40
Royal Arcanum v. Green, 237 U.S. 531 40
Russell v. The Queen, 7 App. Cas. 329 (1881) 27
Seaman v. Philadelphia Warehouse Co., 274 U.S. 403 38
Selig v. Hamilton, 234 U.S. 652 40
Sovereign Camp v. Bolin, 305 U.S. 66 40
Spiller v. Turner, [1897] 1 Ch. 911 28
Talbott v. Silver Bow County, 139 U.S. 438 26
Territory v. Lee, 2 Mont. 124 (1874) 26, 27
Tot v. United States, 319 U.S. 463 18
Union Colliery Co. v. Bryden, [1899] A.C. 580 27
United Commercial Travelers of America v. Wolfe, 331 U.S. 586 40, 41
United States v. Dewitt, 9 Wall. 41 30
United States v. Johnson, 319 U.S. 302 20*n.*
Williams v. North Carolina (II), 325 U.S. 226 36, 38
Wuchter v. Pizzutti, 276 U.S. 13 23

Constitution:

Art. IV, sec. 1 34
Art. IV, sec. 3, cl. 2 26
Fifth Amendment 5, 16
Tenth Amendment 3, 5, 7, 29, 31, 33, 34, 43, 45
Fourteenth Amendment 5, 17, 23, 32

Statutes:

Acts of Congress

Act of March 27, 1804, c. 56, sec. 2, 2 Stat. 298 (U.S.C., Title 28, sec. 1738) 34
Act of March 3, 1917, c. 171, 39 Stat. 1132 12
Organic Act of the Virgin Islands (Act of June 22, 1936, c. 699, 49 Stat. 1807; U.S.C., Title 48, secs. 1405-1406) 4, 5, 14, 16, 17, 19, 23
Revised Organic Act of the Virgin Islands (Act of July 22, 1954, c. 588, 68 Stat. —; U.S.C., Title 48, secs. 1541 note, 1611-1613) 14*n.*, 16*n.*
Treaty of Cession between Denmark and the United States, 39 Stat. 1706 (1917) 12

Virgin Islands legislation

Code of Laws for the Municipality of St. Croix (1920) c. 44, sec. 9 13
Code of Laws for the Municipality of St. Thomas and St. John (1921), c. 44, sec. 9 13
Ordinance to Amend Sections 8 and 9, Chapter 44, Title III, of the Code of Laws of the Municipality of St. Thomas and St. John (1939) 14
Divorce Law of the Virgin Islands (Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944) 14
Divorce Law of the Virgin Islands, sec. 9(a) 15, 19, 20
Bill Passed by the Legislative Assembly of the Virgin Islands on March 27, 1953, vetoed by the Governor, April 22, 1953 15
Act of the Legislative Assembly of the Virgin Islands, Bill No. 55, approved May 29, 1953 15

Other Statutes

Alaska Comp. Laws (1913) sec. 1301 13*n.*

Code of Christian the Fifth (1683) Bk. I, c. II, sec. 4 9, 11
Colonial Law for the Virgin Islands, No. 124 of 1906 12
Statute of December 1, 1797 ("Forordningen om Tamperettens Afskaffelse") 10
Statute of Westminster, 22 Geo. V, c. 4 (1931) 28

Miscellaneous:

Atherton, A Few of Hamilton's Letters (1903) xv, xvi 11*n.*
Atherton, "The Hunt for Hamilton's Mother," 175 North Am. Rev. 229 (1902) 11*n.*
Borum, Familieretten (1946), vol. II, pp. 65-68 11
Borum, Personalstatuttet (1927) 467, 472-482 10, 11
Cardozo, "Divorce without Domicile," 39 Cornell L. Rev. 301 (1954) 31
Deuntzer, Den Danske Civilproces (1901) 50-53 10
Federalist, No. XLV 33
68 Harv. L. Rev. 543 (1955) 37*n.*
Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1 (1945) 32*n.*, 43
Moore, "The Virgin Islands and Its Judicial System," 3 Nat. B.J. 349 (1945) 13*n.*, 29*n.*
Munch-Petersen, Den Danske Retspleje (1924) vol. 2, p. 384 10
Mundell, "Tests for Validity of Legislation under the British North America Act," 32 Can. Bar Rev. 813 (1954) 27
Schachner, Alexander Hamilton (1946) 14-15 11*n.*
Virgin Islands Report (Report of Mr. Butler of Nebraska relative to Investigation and Hearings in the Virgin Islands) 83d Congress, 2d Sess., Committee Print (1954) 4, 54-55 32*n.*
Wheare, Statute of Westminster and Dominion Status (5th ed. 1953) 85-86 et seq. 28

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE.

On November 22, 1954, this Court entered an order inviting Erwin N. Griswold "to appear and present oral argument as *amicus curiae* in support of the judgment below." This brief is filed pursuant to that invitation.[1]

OPINIONS BELOW.

The order of the district court appears at R. 13-14. The *per curiam* opinion of the Court of Appeals (R. 15) is

[1] The amicus curiae has received substantial assistance from Marjorie W. Burke and from Frederick S. Wyle, both of the Massachusetts Bar, from Philip A. Putnam, Assistant Librarian, Harvard Law School, and from Erik Siesby, cand. jur. Copenhagen, for which acknowledgment is made here.

reported at 214 F. 2d 820. Both courts below relied on the decision in *Alton* v. *Alton*, which is reported at 121 F. Supp. 878, and 207 F. 2d 667. This Court granted certiorari in the *Alton* case, but later dismissed it as moot. 347 U.S. 610.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 13, 1954. (R. 16.) The petition for a writ of certiorari was filed on August 5, 1954, and was granted on October 14, 1954. (R. 17.) The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

The Legislative Assembly of the Virgin Islands passed a law providing that (*a*) continuous presence of the plaintiff within the district for six weeks immediately preceding the filing of a divorce suit should be "prima facie evidence of domicile," and that (*b*), where the defendant was subject to the jurisdiction of the court, the court should have jurisdiction of a divorce proceeding "without further reference to domicile." It is sought to apply the law to a case where no connection with the Virgin Islands is shown to exist beyond the wife's presence there for six weeks and the husband's authorization to counsel to appear for him in the court.

The questions arising are the following:

1. Is the law beyond the power delegated to the Legislative Assembly of the Virgin Islands, which is limited to the enactment of laws "of local application" and is subject to the restrictions of a due process clause?

2. If the law is one that Congress purported to authorize the Legislative Assembly to enact, is it valid within the Tenth Amendment and the Full Faith and Credit clause?

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, pp. 46-50.

STATEMENT.

On February 1, 1953, the petitioner became a resident of the Virgin Islands. (R. 8.) On March 16, 1953—forty-three days later—she filed a petition for a divorce in the District Court of the Virgin Islands. (R. 1.) On the following day, March 17, 1953, the petitioner's husband executed, in New York, a power of attorney authorizing counsel to appear on his behalf and represent him in the divorce proceedings. (R. 7-8.) Two days later the husband's counsel filed an answer (R. 6), and a waiver and consent "to the hearing of this cause as if by default," signed by the husband. (R. 6.) On the following day, March 20, 1953, the wife appeared before a District Court Commissioner and was examined. She gave no proof of domicile beyond her testimony that she had been "a resident and inhabitant" of the Virgin Islands continuously since February 1, 1953. (R. 8-9.) On the same day the Commissioner entered findings of fact and conclusions of law recommending that a divorce be granted.

The proceedings were thereafter held in abeyance pending a decision in *Alton* v. *Alton*. That case was dismissed as moot by this Court on June 1, 1954. 347 U.S. 610. On June 21, 1954, the petitioner's attorneys moved that a decree of divorce be issued pursuant to the Commissioner's

recommendation (R. 11), and on the same day a hearing was held by the court. (R. 12-13.) It does not appear that the petitioner was herself present at the hearing. The court asked counsel for the petitioner whether he had any further evidence to offer on domicile, to which counsel answered: "No, sir." (R. 12.) The court then stated that in his opinion "the proof herein is not sufficient to establish domicile." (R. 12.) Counsel then referred to the legislation of the Legislative Assembly of the Virgin Islands which is discussed in this brief, and the court stated that "I doubt that it is sufficient to confer jurisdiction on this Court to grant this divorce and so rule." (R. 12.)

On the following day an order dismissing the petition for want of jurisdiction was entered. (R. 13-14.) The petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment on the authority of its prior decision in *Alton* v. *Alton*. (R. 15.) The case was then brought here for review.

SUMMARY OF ARGUMENT.

I.

This case turns on the validity and effect of certain laws enacted by the Legislative Assembly of the Virgin Islands. The Virgin Islands were acquired by the United States in 1917. They had previously been under Danish sovereignty.

Under the Organic Act of 1936 the Legislative Assembly of the Virgin Islands was established. This consists of the Municipal Council of St. Croix, and the Municipal Council of St. Thomas and St. John, sitting together. In 1944 the Legislative Assembly adopted a divorce law for the Virgin Islands, based largely on earlier provisions enacted by the

two Municipal Councils. By the 1944 law it was provided that a divorce might be granted where the plaintiff was "an inhabitant of the district at the commencement of the action and for six weeks prior thereto."

In 1953 the Legislative Assembly of the Virgin Islands passed the provision which is directly involved here. It provides that, where the plaintiff has been resident for six weeks in the Virgin Islands, "this shall be prima facie evidence of domicile." It further provides that, where the defendant is subject to the jurisdiction of the court, "then the court shall have jurisdiction of the action and of the parties thereto without further reference to domicile."

The power given to the Legislative Assembly of the Virgin Islands is limited by the provisions of section 19 of the Organic Act of 1936. Under this, the legislative power extends "to all subjects *of local application.*" (Italics added.) In addition, Congress expressly enacted for the Virgin Islands the limitations of the due process clauses of the Fifth and Fourteenth Amendments.

It is first argued in this brief that the statute enacted by the Legislative Assembly of the Virgin Islands exceeds the power which has been conferred on that body. It is argued, second, that Congress could not validly authorize the law here involved, because of the limitations of the Tenth Amendment and the general considerations inherent in the Federal system established by the Constitution. Finally it is argued that the statute here involved is invalid because it fails to give full faith and credit to the laws of other States, and is inconsistent with the general assumptions underlying a Federal system.

II.

The authority of the Legislative Assembly of the Virgin Islands is limited to "subjects *of local application*" (italics added), and by a due process clause. The law in question

is not one "of local application" if it is construed to be applicable in this case. It is therefore *ultra vires*, and invalid.

The Virgin Islands legislation is put in the form of a presumption. However, in its operation it is simply a rule of law. Whether the defendant is before the court or not, the statute, if valid and applied, simply makes domicile immaterial. It authorizes the court to grant a divorce in every case when the plaintiff has shown presence for six weeks, without more. Such a law is not a law for the Virgin Islands. It is not needed for the divorce of Virgin Islanders. When enacted for use by others, it is by that very fact no longer a law "of local application."

That the law is beyond the power granted to the Virgin Islands is also supported by the "due process clause" included by Congress in the Organic Act. This due process clause shows the intention of Congress as to the limited extent of the legislative power it was granting to the Virgin Islands.

The Organic Act should be construed to confine the power of the Legislative Assembly within traditional limits in order to avoid the grave constitutional questions which will have to be considered if this legislation is regarded as authorized by Congress.

When this case arose, the Virgin Islands were an "insular possession" of the United States. They are now an "unincorporated territory." In either event, they are a subordinate political entity, with no independent powers; they may exercise no power except that granted by Congress. Territorial legislation has often been held invalid because inconsistent with or not authorized by Congressional legislation. The same rule has long been established

in determining the powers of the various subordinate legislatures of the British Commonwealth. The reasoning behind these rules, developed in the evolution of the British system, seems equally applicable here.

III.

If the law enacted by the Legislative Assembly of the Virgin Islands is within the purported authorization of Congress, then it is invalid. It invades the powers reserved to the States by the Tenth Amendment, and ignores the implications of a Federal system.

Congress has always been scrupulous to avoid interfering with the States in the area of marriage and divorce. This fact supports the contention that Congress has not authorized such an interference by the Virgin Islands. The restraints imposed on Congress by the Tenth Amendment may well be more restrictive than those imposed on the States (by the implications of the Federal system) to refrain from interfering with each other.

The statute here, if effective, substantially impairs the control of the States over the marital status of persons domiciled within their borders, a matter which was clearly reserved to the States when the Constitution was adopted. A merely colorable connection with the Virgin Islands should not be enough to defeat the power of a State which, under the Constitution and the Tenth Amendment, is sovereign in the field of marriage and divorce. It should not be within the power of the Federal Government, consistently with the Tenth Amendment, and the implications of a Federal system, to provide the means for the evasion of a power clearly reserved to the States by the Constitution. A statute enacted by Congress, or by the authority of Congress, which interferes with the effective powers of the States in such a field is beyond Federal power.

The statute is also invalid under the Full Faith and Credit clause, made applicable to the Virgin Islands by statute. If divorce is to be treated as a transitory action, then the Full Faith and Credit clause requires that the rule of law to be applied should be that of the State with which the parties have substantial connection. No such provision is made in the Virgin Islands statute.

The connection which has traditionally been used in the field of divorce is that of domicile. It may well be appropriate in some situations to proceed in a divorce case on a jurisdictional basis somewhat less than or different from the prevailing conception of domicile. The essence of the rule is that there should be a substantial and real connection with the State.

A Federal system necessarily implies that there will be mutual restraint among the several members of the system. This is reinforced by the Full Faith and Credit clause. A State cannot undertake to proceed in divorce matters, consistently with the Full Faith and Credit clause, without giving full faith and credit to the laws of the State which has a "normal relation to the transaction."

Over the past generation this Court has decided in a large number of cases that States must give full faith and credit to the laws and legislation of other States. These cases all involved questions of contact and relationship. The Virgin Islands statute purports to authorize the court to proceed, not only without domicile, but also without any substantial contact between the forum and the relationship involved. The Virgin Islands statute fails to recognize the law which has proper contact with the situation. It is therefore invalid under the Full Faith and Credit clause, even if it should be held to be otherwise authorized by Congress.

ARGUMENT.

I.

Introduction.

A.

The Legislative Background.

This case turns on the validity and effect of certain legislation passed by the Legislative Assembly of the Virgin Islands. In considering that question it may be helpful to have a rather complete statement with respect to the legislation involved. This requires reference both to the law and legislation of the Virgin Islands and to certain Acts of Congress establishing the legislative authority for the Virgin Islands.

(1) *The Danish Background.*

The islands which are now the Virgin Islands of the United States were under Danish sovereignty (except for two brief intervals between 1801 and 1815) until they were ceded to the United States in 1917. At the time of their cession the law applicable in these islands was Danish in origin.[2]

Denmark is not a Civil Law country. It did not use nationality as a jurisdictional base. Since at least 1683 the jurisdiction of courts in Denmark has been based on the Code of Christian the Fifth (Christian den Femtes Danske Lov; available in English translation as The Danish Laws: or, The Code of Christian the Fifth, published in London, in 1756). Book I, c. II, sec. 4, of this Code reads as follows:

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[2] This Court administers the law of the Virgin Islands, insofar as the prior Danish law is an element in the present law of the Virgin Islands, or is relevant in forming the background of that law, this Court can, of course, take judicial notice of it. It is not "foreign law" which has to be proved by evidence.

> "All and every one, who do not on Account of a particular Office which they bear, belong to a peculiar Court, are liable to the ordinary Court, where they inhabit or where they reside."

This law is regarded as establishing the "venue" for civil suits, that is, the place where such suits may be brought.

Since a statute of December 1, 1797 ("Forordningen om Tamperettens Afskaffelse"), the rule of jurisdiction in divorce cases has been the same as in other civil cases, namely, that they shall "be brought before the court which is the venue of the defendant." This rule was applied in divorce cases regardless of the fact that the spouses or one of them was a foreigner. Borum, Personalstatuttet (1927) 467; 2 Munch-Petersen, Den Danske Retspleje (1924) 384.

Under the Danish conception more than one establishment or residence could be maintained with a consequent venue at each of them. A person under Danish law had his venue only where he had such a permanent home, and not where he was merely transitorily present. Deuntzer, Den Danske Civilproces (1901) 50-53. A translation of page 52 of this work is as follows:

> "It is generally agreed that Christian the Fifth's Law is to be understood in such a way that the mere residence does not constitute a venue when the defendant has a permanent home whether in this country or not. Consequently persons who have their home abroad cannot be sued according to Danske Lov 1-2-4 during their stay in this country."

Thus it appears that the Danish concept of venue, though differing from our concept of domicile, was very similar to it, and required a connection with the forum much more definite than a mere temporary residence. The

terms "inhabitant" and "residence" as currently used in the Virgin Islands practice (see R. 1 and 8) are apparently directly traceable to Christian the Fifth's Law of 1683 in Denmark. The decision of the Court of Appeals in *Burch* v. *Burch*, 195 F. 2d 799, that these words should now be construed as equivalent to "domicile" is entirely consistent with their meaning in the Danish law, and does not represent any material departure from the rules of divorce jurisdiction or venue which have long been applicable in the Virgin Islands.

Reference is made in *Burch* v. *Burch*, 195 F. 2d 799, 805-806, to the granting of divorces in Denmark on the ground of "incompatibility of temperament" since about 1790. But divorces on that ground were not granted by courts under Danish law, but by an administrative proceeding. In theory, the King was an absolute monarch, and he granted divorces as a matter of prerogative or discretion. In practice, these were handled by a ministry in accordance with rather fixed rules, although the grant of divorce remained a matter of discretion. Borum, Personalstatuttet (1927) 472-482. Moreover, "incompatibility of temperament" alone was at most a ground for a formal separation, rather like a divorce *a mensa et thoro*. After 1790 it became the practice to grant divorces after three years of such separation. II Borum, Familieretten (1946) 65-68.

Divorce has long been available in the Virgin Islands.[3] The older law was considerably less rigid than that applied

[3] Alexander Hamilton's mother was divorced by her husband, John Michael Lavien, in St. Croix, Danish West Indies, in 1759. The grounds stated were desertion and adultery. The husband was a Dane residing at St. Croix. His connection with St. Croix was not casual. See Atherton, "The Hunt for Hamilton's Mother," 175 North Am. Rev. 229 (1902); Atherton, A Few of Hamilton's Letters (1903) xv, xvi; Schachner, Alexander Hamilton (1946) 14-15.

in the British West Indies. But there were definite jurisdictional standards. The defendant must have been a "resident" and an "inhabitant" of the Virgin Islands, and these words meant more than a merely casual connection. This was the law of the Virgin Islands at the time they were acquired by the United States.

(2) *The Virgin Islands Legislation.*

The last Code of Laws for the Virgin Islands prior to the cession to the United States was the Colonial Law, No. 124 of 1906 (printed in English by the Government Printing Office, St. Thomas, in 1924). Under this, the King of Denmark was the basic source of legislative power. Subject to his authority, two "Colonial Councils" were established in the islands. One of these was the Colonial Council of St. Croix. It had five members appointed by the King and thirteen members elected by the people of the St. Croix district. The other was the Colonial Council of St. Thomas and St. John. It had four members appointed by the King and eleven members elected by the people of its area. These bodies had legislative authority for their areas, respectively, subject to approval or disallowance by the King, through his ministers.

When the Virgin Islands were acquired by the United States in 1917 (the treaty of cession is printed in 39 Stat. 1706), Congress passed a brief statute merely continuing the existing legal system subject to the authority of an American governor. By section 2 of the Act of March 3, 1917, c. 171, 39 Stat. 1132, it was provided that the election laws and "the other local laws, in force and effect in said islands" on January 17, 1917, "shall remain in force and effect in said islands," subject to alteration by the Colonial Council having jurisdiction, with the approval of the

President, or under rules and regulations which the President might prescribe.

Under this legislation the Colonial Councils of St. Croix, and of St. Thomas and St. John, continued, with the same names, and with legislative authority over their respective areas. The appointed members were now named by the Governor appointed by the United States—at first a naval officer.

In 1920 and 1921 each of these Colonial Councils passed a Code of Laws. In each of these Codes the district court was authorized to grant divorces, and "incompatibility of temperament" was included as one of the grounds of divorce. In the Code enacted by the Colonial Council of St. Croix it was provided that a divorce might be granted when the plaintiff had been "an inhabitant of the district" for one year. Code of Laws for the Municipality of St. Croix (1920) c. 44, sec. 9. In the Code enacted by the Colonial Council of St. Thomas and St. John it was provided that the plaintiff must have been "an inhabitant of the district" for six months. Code of Laws for the Municipality of St. Thomas and St. John (1921) c. 44, sec. 9. Although verbally drawn from the law of Alaska,[4] the provisions with respect to divorce seem to have been generally consistent with the earlier law in the Islands.

In 1936 Congress passed an Organic Act for the Virgin Islands. In this Act the Colonial Councils were continued, but were now known as Municipal Councils. Each was given "local legislative power" within its area. The Muni-

[4] Chapter 44, sec. 9, of the Codes of Laws of St. Thomas and St. John, and of St. Croix, respectively, are verbatim the same as section 1301 of the Alaska Comp. Laws (1913), except that the time period in Alaska was two years while it was fixed at six months in St. Thomas and St. John and one year in St. Croix. The lawyer who drafted the Virgin Islands Codes had come from Alaska. See Moore, "The Virgin Islands and Its Judicial System," 3 Nat. B.J. 349, 354 (1945).

cipal Council of St. Croix consisted of nine members, all elected by the people. The Municipal Council of St. Thomas and St. John had seven members, all elected by the people. Act of June 22, 1936, c. 699, 49 Stat. 1807, 1808; U.S.C. Title 48, secs. 1405d, 1405e.

By the same Act the Legislative Assembly of the Virgin Islands was established. This consisted simply of the members of the two Municipal Councils sitting in joint session. Act of June 22, 1936, c. 699, 49 Stat. 1807, 1808-1809; U.S.C., Title 48, sec. 1405f. Thus power was given to each Municipal Council to legislate for its area, and to the two Councils sitting together, as the Legislative Assembly, to legislate for the combined areas.[5]

On October 2, 1939, the Municipal Council of St. Thomas and St. John passed an ordinance reducing the period of residence required in divorce actions from six months to six weeks. Ordinance to Amend Sections 8 and 9, Chapter 44, Title III, of the Code of Laws of the Municipality of St. Thomas and St. John.

In 1944 the Legislative Assembly adopted a divorce law for the Virgin Islands as a whole. Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944. This Act followed the general terms and arrangement of the previous divorce laws passed by the two Colonial Councils. It provided that in actions for divorce the plaintiff "must be an inhabitant of the district at the

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[5] References are made to the Organic Act of 1936 since that was in effect when the legislation was passed and the present suit was brought. Since that time Congress has enacted a new Organic Act, Act of July 22, 1954, c. 588, 68 Stat. ; U.S.C., Title 48, secs. 1541 note, 1611-1613. The Revised Organic Act eliminates the Municipal Councils, putting all legislative authority in the "Legislature of the Virgin Islands," consisting of eleven members. It is not believed to make any change in the validity of the legislation here involved or in the status or power of the chief legislative body.

commencement of the action and for six weeks prior thereto."

The Virgin Islands divorce legislation came before the Court of Appeals for the Third Circuit in 1952, in the case of *Burch* v. *Burch*, 195 F. 2d 799. It was there held that the words "residence" and "inhabitant" in the laws of the Virgin Islands meant "domicile" and "domiciliary."

Following the *Burch* decision, the Legislative Assembly of the Virgin Islands, on March 27, 1953, passed a bill which eliminated the words "inhabitant" and "residence" from the divorce law of the Islands, and provided expressly that there should be jurisdiction to grant divorces where the plaintiff had been "physically present" within the district for six weeks prior to the commencement of the action. This bill was vetoed by the Governor on April 22, 1953. (The text of the bill and the veto message of the Governor are set forth in full as Appendices B and C, pages 53-55, of the petitioner's brief in this case.)

Thereafter, on May 19, 1953, the Legislative Assembly of the Virgin Islands enacted a bill adding a new paragraph (a) to section 9 of the Divorce Law. The Governor signed this bill on May 29, 1953. Bill No. 55, 17th Legislative Assembly of the Virgin Islands, 1953. This new paragraph, the validity and effect of which are directly involved in this case, reads as follows:

> "(a) Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the court shall have jurisdiction of the action and of the parties thereto without further ref-

erence to domicile or to the place where the marriage was solemnized or the cause of action arose."

(3) *The Limitations in the Organic Act.*

Before leaving this discussion of the legislative background, a more detailed reference must be made to the Congressional enabling legislation. The power given to the Legislative Assembly of the Virgin Islands is limited by the provisions of section 19 of the Organic Act of the Virgin Islands (Act of June 22, 1936, c. 699, 49 Stat. 1807, 1811; U.S.C., Title 48, sec. 1405r), which reads as follows:

> "The legislative power of the Virgin Islands shall extend to all subjects *of local application* not inconsistent with this Act or the laws of the United States made applicable to said islands . . ." (Italics added.)[6]

It was further provided in section 7 of the Organic Act of 1936 that "The legislative assembly shall have power to enact legislation applicable to the Virgin Islands as a whole . . ."

The Organic Act established the District Court of the Virgin Islands and gave it jurisdiction over a number of subjects, including "All cases of divorce and annulment of marriage." Act of June 22, 1936, c. 699, § 28, 49 Stat. 1807, 1814; U.S.C., Title 48, sec. 1406.

In addition, Congress expressly provided that the legislative bodies in the Virgin Islands should be subject to the limitations of the due process clauses of the Fifth and the

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[6] This same language is continued in the Revised Organic Act of the Virgin Islands, enacted on July 22, 1954. Section 8(a) of this Act provides that "the legislative authority and power of the Virgin Islands shall extend to all subjects *of local application* not inconsistent with this Act . . ." (Italics added.)

Fourteenth Amendments. The Organic Act provided that (Act of June 22, 1936, c. 699, 49 Stat. 1807, 1815; U.S.C., Title 48, sec. 1406g)—

> "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws."

B.

Division of the Argument.

The court below held in the *Alton* case that the legislative power of the Virgin Islands with respect to divorce was "*on a par with the States* as to all matters properly included in the grant" (207 F. 2d at 669; italics added). The petitioner's brief quotes only the italicized words, and ignores the qualification, treating the legislation as if it had been passed by a State. It is believed that this is a faulty analysis and that it makes the case appear more difficult than it really is.

This brief will argue, *first*, that the law of the Legislative Assembly of the Virgin Islands here in question exceeds the power conferred on that Assembly by Congress, and is, in the words often used with respect to British colonial and dominion legislation, *ultra vires*. This is an argument which is applicable only to the particular Virgin Islands law relied on here. It requires no direct consideration of the limits of the power of Congress or of the States.

It will be argued, *second*, that Congress could not validly authorize the law here involved because of the limitations placed on the power of Congress by the Tenth Amendment and by the general considerations inherent in the Federal system established by the Constitution. This argument

is one applicable only to Congress. It requires no direct consideration of the validity of similar legislation if enacted by a State.

Finally, it will be argued that this legislation is not valid, because it fails to give full faith and credit to the laws of other States, and is inconsistent with the general assumptions underlying a Federal system.

If the Court accepts the first argument, it will not have to consider the second and third; if it accepts the second argument, it will not have to consider the third. It is believed that the first argument is a sound and sufficient basis for the disposition of the case, and that the second and third arguments need not be considered by the Court except as their difficulty and novelty are factors which tend to support the conclusion that the enabling Act of Congress did not authorize the present legislation. On this basis most of the questions discussed at length in the opinions of the court below in *Alton* v. *Alton* and in the brief of the petitioner in this case need not be decided. They are discussed in Point III of this brief in the event that the Court concludes that the legislation here involved was intended to be authorized by Congress.

II.

The Law, if Construed to Apply to Persons having No Substantial Connection with the Virgin Islands, is Ultra Vires and Invalid.

There has been much discussion in this case about the law relating to presumptions, including such cases as *Mobile, J. & K.C. R. Co.* v. *Turnipseed*, 219 U.S. 35, and *Tot* v. *United States*, 319 U.S. 463. This learning is important and difficult. If it were necessary to apply it here, it would, it is submitted, support the conclusion reached below. For we have here, in the first part of the statute

(quoted at pp. 15-16, above), a presumption which relieves the person having facts peculiarly within his own knowledge from any responsibility to produce those facts, and puts that burden on the other party, who cannot possibly know as much about the facts relating to the plaintiff as the plaintiff does. Such a presumption is on its face unreasonable.

But it is not necessary to proceed on this ground. Let us look at the Virgin Islands legislation with particular reference to its underpinnings.

A. The Law is Not One "of Local Application."

The Legislative Assembly of the Virgin Islands has no sovereign powers. Its authority is delegated by Congress and is effective only within the limits set by Congress. As has been pointed out above, Congress has given the Legislative Assembly of the Virgin Islands authority to make laws with respect to "subjects *of local application.*" (Italics added.) Act of June 22, 1936, c. 699, sec. 19, 49 Stat. 1807, 1811; U.S.C., Title 48, sec. 1405r. In addition, its authority is limited by a due process clause which Congress incorporated into its Organic Act. Act of June 22, 1936, c. 699, § 34, 49 Stat. 1807, 1815; U.S.C. Title 48, sec. 1406g.

The law in question will first be examined in the light of the limitations on the Legislative Assembly's authority. Assuming the validity and effectiveness of the statute, there are two possible situations with respect to the defendant, both directly dealt with by the Virgin Islands law:

1. *The defendant may not be served or appear or otherwise be subject to the jurisdiction of the court.* In this event, the first part of section 9(a) is applicable. The plaintiff proves that she has been "within the district" for six weeks, without more. Then the "presumption"

comes into operation, and her proof of presence is "prima facie evidence of domicile." The court is thereupon authorized to grant the divorce. There is no necessity of further proof, and the other party is not before the court.[7]

Where the defendant is not before the court, the language of the statute is that of presumption, but that does not describe its intended purpose and effect. The actual operation and consequence of the statute, if it is applied as written, is that presence for six weeks, without domicile at all, is sufficient basis for jurisdiction for divorce in any case where the defendant is not subject to the jurisdiction of the court. The fact that the statute is phrased in terms of "prima facie evidence" should not obscure the fact that what it does is to provide that the court may proceed when the plaintiff shows six weeks' presence and no more, in cases where the defendant is not before the court. Though lip service is paid to domicile, the statute in fact makes domicile immaterial where the defendant is not before the court.

2. *The defendant may be served within the district, or he may appear, thus becoming subject to the jurisdiction of the court.* In this case, the second clause of section 9(a) of the Virgin Islands law comes into operation. Under this, "the court shall have jurisdiction of the action

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[7] The judge may raise the question, but he can hardly be expected to perform adequately the functions of counsel, such as looking up witnesses. In the district court below the judge raised the question of the validity of the statute. He did not indicate that he would feel obliged to cross-examine the plaintiff if the statute is valid.

The absence of an adversary proceeding in this entire class of cases vitiates the usual premises on which the whole system of presumptions is built. Cf. *United States* v. *Johnson*, 319 U.S. 302. Moreover, the presumption, if effective, would preclude the federal appellate courts from exercising their important function of policing the lower court in this area. Cf. *Hauptman* v. *United States*, 43 F. 2d 86 (C.C.A. 9th, 1930).

and of the parties thereto without further reference to domicile." In such a case, it is submitted, the proper construction of the statute is that domicile is immaterial. The court may proceed simply on the plaintiff's allegation of six weeks' presence. Even if the defendant should seek to contest the issue of domicile he would be barred, since domicile is, under the statute, wholly immaterial.

Thus it appears that the statute is one which, in every case, makes it unnecessary to show domicile. In every case, whether contested or not, whether the defendant is before the court or not, the court is made to have jurisdiction when the plaintiff has proved his presence for six weeks, without more. This is not a presumption in any case. This is a rule of law, a rule of law which says that domicile need *never* be proved in any divorce case, and that a divorce may *always* be granted, as far as jurisdiction to proceed is concerned, when the plaintiff has shown presence for six weeks, without more.[8]

Is such a law one "of local application" in the Virgin Islands? It is submitted that it is not. For bona fide residents of the Virgin Islands, domiciled there, it performs no function and is wholly unnecessary. Virgin Islanders can readily prove their domicile in the Islands. (We are not dealing here with a case of long-continued residence which for some reason did not amount to domicile. It might be that the Virgin Islands Legislative Assembly would have authority to deal with such a case. But that is not this case.) The only persons for whom this statute is useful are persons who are not in fact domiciled in the Virgin

[8] This is the position taken in the petitioner's brief (pp. 12-18) as to the construction of the statute when the defendant is before the court. The legislative history (set out at pages 53-55 of the petitioner's brief) shows clearly enough that the purpose of the legislation was to get around the decision in *Burch* v. *Burch*, 195 F. 2d 799, requiring proof of domicile in proceedings for divorce.

Islands,[9] whose connection with the Virgin Islands is in most cases limited to six weeks, and in all cases is short of domicile. Such a law is not a law for the Virgin Islands. It is an attempt to pass a law for all the world except the Virgin Islands [10]—with particular reference, of course, to the United States.

On its face, therefore, the statute is not one "of local application." No one questions the power of the Legislative Assembly of the Virgin Islands to make a divorce law for Virgin Islanders. This law, however, is not necessary for and is of no use or value for the divorce of Virgin Islanders. When it is applied to others it is by that very fact no longer a law "of local application." If the statute provided that persons proceeding under it should be treated as divorced *within the Virgin Islands* it might be "of local application." Such a decree, however, would have little appeal in the market place, simply because it is obviously only the *external effect* of the decree which is sought when the parties are not domiciled in the Islands. A law which is designed to provide, for practical purposes, *only* an external effect is not, it is submitted, one "of local application."

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[9] Mrs. E. Granville-Smith is listed in the Manhattan telephone directory for October, 1954, at page 658, column 2, with address at 516 East 78th Street. She is also listed, with address at 12 East 64th Street, in the Manhattan telephone directory for October, 1953, page 664, column 4. She is not listed in the Manhattan telephone directory for October, 1952. The amicus curiae has been shown a copy of a letter purporting to come from Mrs. Granville-Smith, dated December 2, 1954, and addressed from 516 East 78th Street, New York 21, N.Y. These facts are mentioned only to show, what is obvious enough anyway, that the legislation, as applied in this case, is not "of local application."

[10] Cf. *Buchanan* v. *Rucker*, 9 East 191, 194 (1808): "Can the island of Tobago pass a law to bind the rights of the whole world?" Should this be done by a majority of a legislative body of sixteen persons in a territory of 26,665 persons (about sixteen-thousandths of 1% of the population of the United States)?

In its application to persons not domiciled in the Virgin Islands (or at least to persons not having a really substantial connection with the Virgin Islands) the statute is not a local law; it exceeds the power granted by Congress, and is *ultra vires*. This seems to be the simple and sufficient ground for disposing of this case.

B.

The Law Exceeds the "Due Process" Limitations Imposed by Congress.

This conclusion is also supported by the "due process clause" included by Congress in the Organic Act. Act of June 22, 1936, c. 699, § 34, 49 Stat. 1807, 1815; U.S.C., Title 48, sec. 1406g. It is true, as pointed out by the dissent in the *Alton* case, that no one is here claiming that his "due process" is being violated. But the Virgin Islands statute is generally applicable. The first clause, if valid, could be applied to an absent spouse who knew nothing of the proceedings. The second clause could be applied to a spouse who went to the Virgin Islands for a brief vacation, or, indeed, was merely passing through. It would be hard to sustain the validity of the statute in such applications, and this defect should vitiate the statute generally. Cf. *Wuchter* v. *Pizzuti*, 276 U.S. 13; *Barrows* v. *Jackson*, 346 U.S. 249.

Moreover, the due process clause in the Organic Act has a broader effect than the protection of individuals who do object to the statute's application. It is an expression of the intention of Congress as to the extent of the legislative power it was granting to the Legislative Assembly of the Virgin Islands. Over the past ninety years the due process clause, particularly of the Fourteenth Amendment, has become the basis for working out and delimiting the jur-

isdiction of the States in many situations.[11] Ordinarily this has been in contested cases, where someone was contending that his "due process" was being violated, and this Court spelled out the limits of jurisdiction by deciding that his contention was or was not sound. Thus the due process clause embodies most of the present learning about jurisdictional limits, and it has become a convenient shorthand way of prescribing that jurisdictional limits should be observed.

When Congress laid down a due process clause as a limitation on the legislative power of the Legislative Assembly of the Virgin Islands, it was saying, in effect, that the Legislative Assembly should not have power to legislate except within the then traditional areas of jurisdiction. When this statute was passed in 1936, domicile was clearly a general basis of jurisdiction in divorce cases throughout the United States.

This "due process" clause in the Organic Act thus becomes a further limitation on the legislative power of the Virgin Islands, not because any person claims that he has been deprived of anything without due process of law, nor because any State makes such a claim, but because Congress has laid down this basic standard of jurisdiction in authorizing the Legislative Assembly to legislate at all. There may be room for experiment as to jurisdiction by the several states. But Congress has not authorized the Virgin Islands to carry out such experiments; on the contrary, Congress has expressly legislated that the enactments of the Virgin Islands shall be on "subjects of local application," and within the limits of due process as that term was understood in 1936. Cf. *Bloomer* v. *Todd*, 3 Wash. Terr. 599 (1888).

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[11] See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714; *Milliken* v. *Meyer*, 311 U.S. 457; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, among many others.

C.

The Organic Act should be Construed to Limit the Power of the Virgin Islands Legislature so as to Avoid Grave Constitutional Questions.

Finally, if there should be any doubt about the construction of the applicable Acts of Congress involved here, that doubt should be resolved in favor of the construction here advocated. For a broader construction would raise grave and difficult constitutional questions which should not be faced by this Court unless and until Congress makes it plain that it intends to authorize legislation such as that involved here. Cf. *Helvering* v. *Griffiths*, 318 U.S. 371.

These constitutional questions are discussed in Point III of this brief. They are novel and difficult constitutional questions. When and if they are directly raised they will have to be resolved by this Court. But they are large questions of fundamental importance in a Federal system, and should not be decided prematurely. There is no need to decide them now if it is concluded that the legislation involved here exceeded the authority granted by Congress. That is itself a reason for construing the Acts of Congress not to give such authority.

D.

Authorities on Analogous Questions Support the Construction Here Advanced.

The argument thus far has been based largely on the face of the statute as applied to the facts of this case. Reference may now be made to decisions in support of this conclusion.

At the time the Virgin Islands legislation was passed and this case arose, the Virgin Islands were an "insular possession" of the United States under the Organic Act

of 1936. Under the Organic Act of 1954 the Virgin Islands are an "unincorporated territory" of the United States. It is obvious that this is a subordinate political entity, entirely subject to the authority of the Congress of the United States (under its constitutional power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"; Art. IV, sec. 3, cl. 2). As this Court said in *Talbott* v. *Silver Bow County*, 139 U.S. 438, 446, a territory "has no independent powers. It is a political community, organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization." See also *National Bank* v. *County of Yankton*, 101 U.S. 129, 133.

Territorial legislation has often been held invalid because inconsistent with or not authorized by the Congressional legislation. An early case is *Ferris* v. *Higley*, 20 Wall. 375. See also *Clayton* v. *Utah Territory*, 132 U.S. 632. A case which is relevant though now somewhat quaint is *Bloomer* v. *Todd*, 3 Wash. Terr. 599 (1888). It there appeared that Congress had authorized the legislature of Washington Territory to make provision for "citizens" to vote at future elections. The legislature passed a law providing that women might vote. The court held this invalid on the ground that Congress could not have contemplated that the words it used would authorize women to vote. The result was changed some time ago, but the rule of the case that territorial legislation cannot go beyond the authorization of Congress is still valid, and is applicable here.

See also *Territory* v. *Lee*, 2 Mont. 124 (1874), where the Territory of Montana passed a law forfeiting all mines

held by aliens. This was held invalid on the ground, *inter alia*, that it was not within the power of "local legislation." 2 Mont. at 143.

The same rule has long been established in determining the powers of the various subordinate legislatures in the British Commonwealth. When such legislation goes beyond the powers delegated it is said to be *ultra vires*. Many legislative enactments have been held invalid on this ground. It is not necessary to catalogue them in detail here. Reference may be made to *Attorney-General for Saskatchewan* v. *Attorney-General for Canada*, [1949] A.C. 110; *Attorney-General for Canada* v. *Attorney-General for Quebec*, [1947] A.C. 33, and *In re the Insurance Act of Canada*, [1932] A.C. 41. In these cases various tests have been formulated: Acts are to be judged according to their "pith and substance" (*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, 587), according to their "true nature and character" (*Russell* v. *The Queen*, 7 App. Cas. 829, 839-840 (1881)), according to their "effect" and "purpose" or "object" (*Attorney-General for Alberta* v. *Attorney-General for Canada*, [1939] A.C. 117, 130-131). See Mundell, "Tests for Validity of Legislation under the British North America Act," 32 Can. Bar Rev. 813 (1954). It seems clear enough that the "pith and substance," the "true nature and character," the "effect," the "purpose," the "object," of the Virgin Islands legislation involved in this case is external, not internal; that it is designed for non-residents of the Virgin Islands, and is not "of local application."

Some of the British cases have involved questions of the territorial application of legislation. Perhaps the leading case is *MacLeod* v. *Attorney General for New South Wales*, [1891] A.C. 455. That case involved a statute of New South Wales which defined bigamy as a second marriage while the first spouse was still living, "wheresoever such

second marriage takes place." It was sought to apply the statute to a man who married his first wife in New South Wales and then married again in St. Louis, Missouri. The court held that, despite the terms of the statute, it must be construed to apply only in cases where the second marriage occurred in New South Wales. Otherwise, it would be *ultra vires* for the New South Wales legislature, which has no extraterritorial powers.

Similar results have been reached in other cases, involving taxes on transactions outside the territorial limits of the legislature which sought to apply its laws. See *Commissioners of Stamps (Queensland)* v. *Wienholt*, 20 Commonwealth L.R. 531 (1915); *London and South American Investment Trust, Ltd.* v. *British Tobacco Co. (Aus.) Ltd.*, [1927] Ch. 107; *Spiller* v. *Turner*, [1897] 1 Ch. 911; *Brassard* v. *Smith*, [1925] A.C. 371.

The rule that various legislatures in the British dominions could not pass legislation with extra-territorial effect was so well established that it was deemed desirable to abrogate it in part as one of the provisions of the Statute of Westminster, enacted in 1931, 22 Geo. V, c. 4. Section 3 of this statute provides: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial application." By its terms, this did not apply to colonies or to the provinces of Canada and the states of Australia. Thus these legislative bodies still remain subject to the rule that they cannot pass extraterritorial legislation. See Wheare, The Statute of Westminster and Dominion Status (5th ed. 1953) 85-86, 134-135, 193-194, 211-212, 224.

The reasoning behind these rules, developed in the evolution of the British system, seems equally applicable here. The Virgin Islands has no trace of sovereignty. It exercises a delegated and limited legislative power. Its authority is to make laws "of local application." What it

has done here is to make a law whose intended and obvious impact is on persons who have no substantial connection with the Virgin Islands.[12] Such a law is, in "pith and substance," one of extraterritorial effect, and is *ultra vires*. Its "object" and "purpose" is extraterritorial, and not internal to the Virgin Islands. It is, therefore, beyond the powers conferred on the Virgin Islands legislature. Whether such a statute could be enacted by a state having sovereignty in this area is another matter.

III.

If the Law Enacted by the Legislative Assembly of the Virgin Islands is within the Purported Authorization of Congress, then it is Invalid under either the Tenth Amendment to the Constitution or the Full Faith and Credit Clause.

A.

The Law, If Federally Authorized, Invades the Reserved Powers of the States.

The framers of the Constitution thought that the absence of power in the Federal Government on matters not granted to that government was clear enough on the face of the Constitution. But, to allay fears, and to remove all doubts, this was made explicit by the Tenth Amendment, adopted in 1791, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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[12] *Cf.* Moore, "The Virgin Islands and Its Judicial System," 3 National Bar J. 349, 359 (1945): "Recently the Legislative Assembly of the Virgin Islands made a bid for American tourists by enacting a law requiring only six weeks' residence for divorce."

It is of course clear that control over matters of marriage and divorce was retained by the States when the Constitution was adopted. There is no federal power with respect to marriage and divorce within the States. This is established by a long list of cases. *Barber* v. *Barber*, 21 How. 582; *In re Burrus*, 136 U.S. 586; *De la Rama* v. *De la Rama*, 201 U.S. 303, 307; *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379. In the *Burrus* case this Court said (pp. 593-594) that "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."

Congress does have power to deal with marriage and divorce in the District of Columbia and the Territories. But this is not a power which should or can be exercised in such a way as to make ineffective the powers of the States with respect to marriage and divorce. Cf. *United States* v. *Dewitt*, 9 Wall. 41. This follows from the inherent implications of a federal system. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316. Nothing in our system of shared powers seems more properly to be allocated to State control than the regulation of marriage and divorce, parent and child, and other aspects of the family relationship.

Congress, as the central legislature in a Federal system, should take great pains to see that its laws, or those enacted by its authority, do not encroach on the legitimate spheres of the States. Indeed, it may be said with confidence that Congress has always been scrupulous to avoid interfering with the States in the area of marriage and divorce. The fact that no case involving such an attempted interference has previously arisen is eloquent evidence of that fact. It also goes far to show that, as argued above, Congress has not in fact authorized such an interference by the Virgin Islands.

But this is not just a matter of comity or discretion on the part of Congress. This result is also directly required

by the implications of a Federal system, buttressed by the Tenth Amendment. These require Congress to refrain from action which will impair the powers of the States over matters which the Constitution reserved to them. The restraint on Congress imposed by the Tenth Amendment may well be more restrictive than that imposed on the States (by the implications of the Federal system) to refrain from interfering with each other. We are dealing here with legislation made under Federal aegis. The power of the Virgin Islands with respect to marriage and divorce should be limited to proper subjects for Federal action.

The law involved in this case has the intended effect, if it is valid, of enabling one party to a marriage to get a divorce if he has been present in the Virgin Islands for six weeks, without either party being domiciled there. If such a law is valid, would not a mail order law be equally valid, without any residence at all?[13] What is the magic in six weeks? Indeed, the six weeks' residence requirement is designed to produce tourist business, and bears no relation to any substantial or permanent connection with the Virgin Islands.[14] The only real distinction between this

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[13] This question is no more striking than it is realistic. *Cf.* Cardozo, "Divorce without Domicile," 39 Corn. L. Rev. 301, 302 (1954): "If a state is to be permitted to grant divorces without bona fide domicile, however, they can grant them on five weeks' residence, three weeks, one week, one hour—why not by mail without any physical presence, as with other transitory actions? This would destroy all control of a state over the marital affairs of its citizens. Maybe it would be socially desirable, but is it for the courts to make the decision that it is permissible, when for so long they have said that it is not?"

[14] On February 1, 1954, the St. Croix Chamber of Commerce Newsletter stated that "change in the divorce situation" was one of the reasons for "the lack of tourist business during the present season." See Virgin Islands Report (Report of Mr. Butler of Nebraska relative to Investigation and Hearings in the Virgin

statute and a mail order statute, with both parties consenting to the jurisdiction by entering appearances, is that the present statute can be used only by those citizens of States who have the time and the means to go (or have their spouses go) to the Virgin Islands for six weeks, while a mail order statute would be available to anyone who had the cost of postage and a modest counsel fee.

Is it not obvious that such a statute as this substantially impairs the control of the States over the marital status of persons domiciled within their borders, a matter which was clearly reserved to the States when the Constitution was adopted? Cf. *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U.S. 315 (Cardozo, J.). It may be desirable to have divorce by mutual consent in this country, or by agreement, after a six weeks' waiting period. It may not be desirable to have divorce on such a basis. But is that not an issue which the States should be free (and by "free" is meant really and genuinely and effectively free) to decide for themselves? If people do not like the divorce laws of their State, as decided by the people of their State, they are surely free to move elsewhere. But can it be said that they are entitled to keep their homes in a State, being thereby citizens of that State,[15] and ignore the divorce laws of

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Islands), 83d Congress, 2d Sess., Committee Print (1954) p. 4. See also the interesting statement by Judge Herman E. Moore at pages 54-55 of the same report.

[15] The Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and *of the State wherein they reside*." (Italics added.) It is obvious that "reside" as here used means something more than a casual and transitory presence. Mr. Justice Jackson has observed that it "perhaps is required by the implications of the Fourteenth Amendment" that persons "have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed." Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1, 29 (1945).

the State? Is a merely colorable connection with the Virgin Islands enough to defeat the power of a State which, under the Constitution and the Tenth Amendment, is sovereign in the field of marriage and divorce?

At any rate, it surely is not within the power of the Federal Government, consistently with the Tenth Amendment and the implications of a Federal system, to provide the means for the evasion of a power clearly reserved to the States by the Constitution. Suppose, for example, that Congress were to pass a law providing that a register should be established at the corner of Pennsylvania Avenue and 14th Street, in the District of Columbia, in which any persons domiciled in any State might register and they would thereupon be divorced. Could it be supposed that such a statute would be valid and effective within the Tenth Amendment and the implications of the Federal system? Would this not clearly invade the reserved powers of the States? If not, then the reserved powers of the States with respect to divorce have no reality, and that surely was not the view of the founding fathers. Would such a Congressional statute be any better if it provided for a residence in the District of Columbia, without domicile, for a day, for a week, for six weeks? The impairment of State power would not be materially different in any of these cases. Yet the latter case is precisely the one raised by the Virgin Islands statute involved here, if it can be regarded as having been passed by Congressional authority.

In No. XLV of The Federalist, Madison dealt with the relations of the Federal Government to the States. He wrote: "Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments." And later in the same essay he added: "The

powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

It is true that there are no cases holding that Congress cannot pass such a statute. Congress never has passed such a statute, or anything like it. On the contrary, Congress has consistently refrained from interfering with the States with respect to a matter so clearly within their reserved powers. This long-continued restraint thus becomes a further ground in support of the proposition that Congress has not authorized what has been attempted here.

The Virgin Islands statute involved in this case is an attempted exercise of delegated Federal power. If it is effective, it will provide matrimonial release for some couples who cannot obtain it, or cannot obtain it so easily, in their home States. But if they cannot get what they want, or as they want it, at home, it is because the laws of their own States so provide. That, under our Federal system, made explicit by the Tenth Amendment, is for those States to decide. A statute enacted by Congress, or by the authority of Congress, which interferes with the effective power of the States on this matter is beyond Federal power.

B.

The Law, if Authorized, is Invalid since it Fails to Recognize the Obligations of the Full Faith and Credit Clause.

The Full Faith and Credit clause of the Constitution (Art. IV, sec. 1) is, by its terms, applicable only to the States. But Congress has enacted a statute making the full faith and credit rule applicable to the territories. Originally, Act of March 27, 1804, c. 56, sec. 2, 2 Stat. 298,

299; now found in U.S.C., Title 28, sec. 1738. The relevant portion of this provision reads as follows:

> "The Acts of the legislature of any State, Territory or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

As applied to this case, full faith and credit is a statutory rule. It is in terms addressed to the court rather than to the legislature, but it directly affects the validity of the legislation here in question. It was clearly the implicit assumption of the Virgin Islands legislation that the court which proceeded under it would decide the case by Virgin Islands law. Thus the legislation cannot be applied in the court consistently with the full faith and credit command.

It is true that the Full Faith and Credit clause has not been regarded as having application to divorce legislation. For many years the States (and the Federal Government in the District of Columbia and the Territories) have granted divorces based on their own laws as to the grounds and the conditions necessary to obtain a divorce. No case is known which requires a State to look to the law of any other State in determining whether a divorce should be granted.

But this has been the rule, it is submitted, only because of the universal assumption that a divorce could not be granted unless at least one of the parties was domiciled within the State, or, in a very few cases, had a close, continuing, and substantial connection with the State. If there is domicile in the State, then there is a close relation with the State and it is appropriate for the State to apply its

own law. If the party is domiciled in the State, then he is a part of that State, one of its inhabitants, a member of its body politic. The State of domicile has a proper interest in his marital status, and ordinarily no other State has so strong an interest. It is hardly surprising, therefore, that the rule has grown up almost as a matter of course that the forum applies its own law in divorce cases, and that it does not deny full faith and credit to the laws of any other State in doing so. It applies its own law because the marital status of its citizens is its genuine and legitimate concern. It is not a mere vehicle for granting surcease to strangers to its polity.

But all of this has clearly been based on the premise of domicile in the forum, or at least some substantial and abiding relation between a party and the forum. This was plainly recognized in *Williams* v. *North Carolina* (II), 325 U.S. 226, 229, where this Court said: "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." See also *Jennings* v. *Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948). From the time that standards in this area crystallized more than a hundred years ago, very few cases are known which did not proceed on the basis of domicile, and in those there was a real and substantial relation between one or both parties and the forum.

Domicile is, no doubt, a refined concept. What legal concept is not? It may be appropriate in some situations to proceed on a basis somewhat less than or different from the prevailing conception of domicile. The essence of the rule is that there should be a substantial and real connection with the State whose forum is invoked for a divorce. Of course, domicile is not perfect wisdom; it is not inevitable or inherent. But it is a convenient and sensible way of determining the connection between a person and a State—

which has long been accepted and used for that purpose. It represents a large amount of experience with a problem having wider aspects than the interests of the parties alone.

Some variations from the domicile rule can be readily accepted, while maintaining the necessary element of a substantial and real connection with the State. For example, the English statute, referred to at page 37 of the petitioner's brief, allowing a divorce to a deserted wife after three years' residence even though, under the English rule, she is not domiciled in the forum, seems obviously valid and acceptable, since the wife in such a case has a substantial connection and identification with the forum. Similarly, there should be little difficulty with the situation involved in *Crownover* v. *Crownover*, 274 P. 2d 127 (N.M. 1954), where a divorce was granted under a State statute authorizing such action where the parties are stationed at a military post within the State, and have resided for one year within the State. There the connection with the State is real and substantial. In many cases it is more real and substantial than is the connection of the parties with any other State.

In both of these situations there is long-continued presence in the State, plus an intent to reside therein. Both of these elements are strangers to this case. In both of these situations there are, too, special and artificial circumstances relating to the rules of domicile which are likewise absent here. These decisions are consistent with the essence of the rule of domicile. They are in no sense authorities for rejecting domicile in situations where special circumstances are wholly lacking.[16]

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[16] Even in the odd case of *David-Zieseniss* v. *Zieseniss*, 205 Misc. 836, 129 N.Y.S. 2d 649 (Sup. Ct. 1954), the marriage occurred within the State, which is more than can be said here. See the comment on that case in 68 Harv. L. Rev. 543 (1955). *Gould* v. *Gould*, 235 N.Y. 14, 138 N.E. 490 (1923), involved no question of

If the test is not domicile, then what are its limits? That need not be decided here. It is enough to decide here that a State cannot apply its own law, consistently with the Full Faith and Credit clause, in a divorce case, unless there is a substantial and real connection with the State. Is one year's residence enough? That is not this case. All that needs to be decided here is that six weeks' residence, without domicile, is not enough. That, indeed, has already been decided by this Court, under the Full Faith and Credit clause, in *Williams* v. *North Carolina* (II), 325 U.S. 226.

A Federal system necessarily implies that there will be mutual restraint among the several members of the system. This implication is reinforced by the Full Faith and Credit clause. The rule which is believed to be applicable has been well formulated by this Court in a case involving a question which is analytically closely related to the one involved here. In *Seaman* v. *Philadelphia Warehouse Co.*, 274 U.S. 403, 408, this Court said:

> "The effect of the qualification [upon the right of the parties to stipulate the law governing the contract] is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has *no normal relation to the transaction and to whose law they would not otherwise be subject.*" (Italics added.)

It may be that it will sometime be established that neither domicile nor any connection with the State at all, beyond appearance in its courts, is an essential basis for entertaining a suit for divorce. Divorce would then be-

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the interrelations of a Federal system. Moreover, the parties there had resided in France for over five years when the divorce suit was brought, and the divorce was granted on a ground recognized in New York.

come a transitory action. (Would that mean that a deserted wife could *only* get a divorce where she could serve the defendant, as in other transitory actions?) If such a wholly novel step is to be attempted, it would seem that it should be done by a State and not by a possession or territory exercising delegated legislative authority. If such a step has been taken by the Virgin Islands in this case, it is submitted that the legislation is invalid because it denies full faith and credit to the divorce laws of the States. If the Virgin Islands undertakes to proceed without domicile, and without any further requirement than six weeks' presence, then it is a place which has "no normal relation to the transaction," and is one "to whose law" the parties "would not otherwise be subject." In such a case, even if the Virgin Islands court has "jurisdiction" over the parties, that jurisdiction cannot be exercised, it is submitted, consistently with the Full Faith and Credit clause without giving full faith and credit to the laws of the State which does have "normal relation to the transaction," and is the one to which the parties' marital relation would "otherwise be subject."

Over the past generation this Court has decided in a large number of cases that States must give full faith and credit to the laws and legislation of other States. These cases fall into several groups. It is not necessary to discuss them in detail here. It is sufficient to indicate the types of cases which have required reference to the law of another State.

1. The earliest of these cases involved insurance contracts. These cases include *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Home Insurance Co.* v. *Dick*, 281 U.S. 397; *Hartford Accident and Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143. These cases hold that a State may not properly apply its law to a contract which was made in another

State, thus becoming subject to the law of that State. The Full Faith and Credit clause does not deprive the State of the forum of jurisdiction to hear the case, but it does require that the State should apply the law which is intimately connected with the contract. In the *Hartford Accident and Indemnity* case this Court, in refusing to allow the forum to apply its own law, referred (292 U.S. at 150) to the fact that "the forum has but slight connection with the substance" of the action.[17]

2. Another group of cases involves fraternal benefit societies. These cases include *Royal Arcanum* v. *Green*, 237 U.S. 531; *Modern Woodmen of America* v. *Mixer*, 267 U.S. 544; *Sovereign Camp* v. *Bolin*, 305 U.S. 66; *United Commercial Travelers of America* v. *Wolfe*, 331 U.S. 586.

3. A somewhat related group of cases involves relations between a stockholder and his corporation: *Hancock National Bank* v. *Farnum*, 176 U.S. 640; *Converse* v. *Hamilton*, 224 U.S. 243; *Selig* v. *Hamilton*, 234 U.S. 652; *Marin* v. *Augedahl*, 247 U.S. 142; *Broderick* v. *Rosner*, 294 U.S. 629. See also *Pink* v. *A.A.A. Highway Express, Inc.*, 314 U.S. 201.

4. A final group of cases involves workmen's compensation. These cases include *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145; *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U.S. 532; *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493.[18]

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[17] Cf. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345, where, in passing on jurisdiction to impose a tax, this Court said: "But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires *some definite link, some minimum connection*, between a state and the person, property or transaction it seeks to tax." (Italics added.)

[18] See also *Hughes* v. *Fetter*, 341 U.S. 609, and *First Nat. Bank* v. *United Air Lines, Inc.*, 342 U.S. 396, involving full faith and credit to wrongful death statutes.

All of these cases involve questions of contact and of relationship. In the insurance cases the law of the State of contracting must be applied because that is the law that is most intimately connected with the contract. In the fraternal benefit and corporation cases there is a relationship, and the law which must be recognized and applied is the law having the most intimate connection with that relationship. In the fraternal benefit and corporation cases this is a single law, the law of the State of incorporation. As the workmen's compensation cases show, more than one State may apply its law to an industrial accident. But in each case it is a State having a real and substantial connection with the transaction, and not a mere casual or colorable contact.

These cases are full of statements referring to the closeness of the connection between the parties or the transaction with the State whose law must be applied. For example, in *Modern Woodmen of America* v. *Mixer*, 267 U.S. 544, 551, Mr. Justice Holmes said: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation." In *Broderick* v. *Rosner*, 294 U.S. 629, 645, Mr. Justice Brandeis said: "Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other states." In *United Commercial Travelers of America* v. *Wolfe*, 331 U.S. 586, 606, Mr. Justice Burton said: "The fact of membership in the Ohio fraternal benefit society is the controlling and central feature of the relationship . . . Upon that law the continued existence of the society depends. The foundation of the society is the law of Ohio."

The problem of the Full Faith and Credit clause has not been involved in divorce (apart from the question of recognition of divorce decrees, which is not the question here), because the States have proceeded on the basis of domicile. When the parties, or at least one of them, are domiciled in the State of the forum, then the forum has a sufficient contact with the situation to make it appropriate to apply its own laws. This is not inevitable, but it has clearly been the law. It may be that a State is free to proceed in divorce matters without domicile if it chooses to do so. Where it undertakes to proceed on the basis of six weeks' presence, without more, however, its contact with the situation, with the relationship, is tenuous, to say the least, and, by hypothesis, less close than is that of some other State, ordinarily the State of the domicile. If the State undertakes to proceed in such a case, the underlying implications of the Federal system, and the Full Faith and Credit clause, require that it give effect to and apply the laws of the State which is in fact intimately connected with the situation.[19] Any other rule will deprive the States of control over the marital status of persons domiciled within their borders. Any other rule will be inconsistent with the fundamental assumptions of a Federal system, and with the Full Faith and Credit clause, which was expressly provided as one of the means of maintaining this Federal system.

A great Federal Government is a complex concept and involves a highly articulated structure. This is necessary to provide ample scope for the central government and its powers and proper protection for the States in the exercise of their powers. Many elements—basic conceptions. Full

[19] This point was recognized in the dissenting opinion in *Alton* v. *Alton* 207 F. 2d 667, at the close, pp. 684-685.

Faith and Credit, Due Process, and the Tenth Amendment —are all present to insure that no member of the system shall unduly entrench on another. These are not empty words or concepts. They perform a fundamental function. That, in last analysis, their content is maintained and protected by this Court merely emphasizes the fact that their vitality and effectiveness are of the essence of our Federal plan.

No better statement of factors involved in these questions is known than that made by Mr. Justice Jackson in his address on "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1, 27-30 (1945). The argument on this point may well conclude with extracts from this prescient summary:

> "Always to be kept in mind in dealing with these problems is that the policy ultimately to be served in application of the [full faith and credit] clause is the federal policy of 'a more perfect union' of our legal systems. No local interest and no balance of local interests can rise above this consideration. . . .
>
> "The distinction between federal interest and local interest may be elusive but always it is present in these conflicts. Fundamental to every such conflict of law is that separate states consider their own interests to require inconsistent social or economic policies. . . . Conflicts which we face day after day are less deep and less bitter [than that involved in the Dred Scott case], but none the less they grow out of disagreement between states as to the policies that will promote their social welfare. One state thinks its need is to encourage individual capital to come and exploit its latest resources and therefore is niggardly about putting the burden of industrial accidents upon industry. Another, more fully industrialized perhaps,

adopts a policy of more generous workmen's compensation. Or religious convictions prevailing in one state lead to a highly restrictive policy of divorce, while another grants it on easy terms. . . .

". . . But, even if we could appraise or compare relative local interests, we must lift these questions above the control of local interest and must govern conflict in these cases by the wider considerations arising out of the federal order. . . . The ultimate answer, it seems to me, will have to be based on considerations of state relations to each other and to the federal system. . . .

"Even where each conflicting policy claims recognition on the same ground and the conflict proceeds from contrary findings of fact, there would seem to be a federal interest, distinct from that of either state, in its solution. Domicile is the ground which furnishes the best example. . . . The real issue is not whether the court of either state must conform its decision to that of the other, but whether both must not conform their decisions in this field to some federal constitutional standard.

". . . the federal interest is concerned that a Mr. Williams and a Mr. Green have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed. . . . Where the requisite relationship between person and place exists to warrant state exercise of power and to exclude other states from a conflicting exercise of power would seem to present, at least in connection with a full faith and credit problem, a federal question on which, when properly raised, litigants would be entitled to the judgment of a federal court."

CONCLUSION.

1. The statute passed by the Legislative Assembly of the Virgin Islands is beyond the power granted by Congress to that body, and is therefore invalid. It is not "of local application," and it exceeds the limits imposed on the Virgin Islands legislature by the due process clause enacted by Congress. This is the simple and adequate ground to dispose of the case.

2. If the statute should be held to be within the powers intended to be delegated by Congress to the Virgin Islands, then much more difficult questions involving the structure of a Federal system are raised. The basic issue, if Congress has undertaken to authorize the passage of the statute, is one of federalism. Is the temporary inconvenience of leaving one's own home for a short sojourn a sufficient basis for the granting of a divorce without reference to the law of the State where the parties really live? It is submitted that the answer to this question, in a Federal system, is readily apparent. Both the Tenth Amendment and the Full Faith and Credit clause inhibit such a power.

The judgment below should be affirmed.

Respectfully submitted,
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January 15, 1955.

APPENDIX.

Constitutional and Statutory Provisions Involved.

CONSTITUTION.

Article IV, Section 1 of the Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article IV, Section 3, Clause 2 of the Constitution provides in part as follows:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

The Tenth Amendment reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS.

Title 28, U.S.C., sec. 1738 (originally the Act of March 27, 1804, c. 56, sec. 2, Stat. 298, 299), reads as follows:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies

thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

The Organic Act of the Virgin Islands of the United States, enacted on June 22, 1936, c. 699, 49 Stat. 1807 (U.S.C., Title 48, secs. 1405r, 1406, 1406g) contains the following provisions:

"Sec. 7. After January 1, 1937, joint sessions of said municipal councils shall constitute and shall be designated the 'Legislative Assembly of the Virgin Islands.' The legislative assembly shall convene in Saint Thomas upon call by the Governor, and also whenever both municipal councils shall determine by resolutions passed by each of them: *Provided*, That the Governor shall call the legislative assembly at least once during each calendar year. The legislative assembly shall have power to enact legislation applicable to the Virgin Islands as a whole, but no legislation shall be considered other than that specified in the message by the Governor calling such a session,

or in both of said resolutions: *Provided further*, That so long as the membership of the legislative assembly does not exceed sixteen members, a quorum of the legislative assembly shall consist of not less than ten members, and no bill shall be enacted until it shall be passed by a two-thirds majority vote of the members present. The municipal councils shall not enact laws or ordinances in conflict with the enactments of the legislative assembly.

. . . . . .

"Sec. 19. The legislative power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to said islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty entered into by the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents.

. . . . . .

"Sec. 34. No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

. . . . . ."

Section 8(a) of the Revised Organic Act of the Virgin Islands, Act of July 22, 1954, 68 Stat. —, reads as follows:

"The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands,

but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of nonresidents be taxed at a higher rate than the lands or other property of residents."

VIRGIN ISLANDS LEGISLATION.

Sections 8, 9 and 17 of the Divorce Law of the Virgin Islands, enacted by the Legislative Assembly of the Virgin Islands, approved December 29, 1944, read as follows:

"Section 8. When a marriage has been solemnized in the district an action may be maintained to declare it void if the plaintiff is an inhabitant of the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has been an inhabitant thereof for six weeks prior to the commencement of the action.

"Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plaintiff therein must be an inhabitant of the district at the commencement of the action and for six weeks prior thereto, which residence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose.

. . . . . .

"Section 17. Should any section of this law or part thereof be declared invalid by a Court of competent jurisdiction, said declaration shall not invalidate the remainder of this law."

Section 9(a) of the Divorce Law of the Virgin Islands, added by the Act of the Legislative Assembly of the Virgin Islands approved May 29, 1953, reads as follows:

> "Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."